



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 69 OF 2014

PAUL SYENGO MUSYOKAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Kyuso PM Criminal Case No. 234 of 2014 – B. M. Mararo PM)

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 23rd October 2012 at [particulars withheld] Sub Location in Tseikuru District within Kitui County intentionally caused his penis to penetrate the vagina of DM a child aged 9 years. In the alternative he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally touched the vagina of DM a child aged 9 years with his penis. He denied both charges. After a full trial he was convicted on the main charge of defilement and sentenced to life imprisonment.

Dissatisfied with the decision of the trial court the appellant filed an appeal to this court. He later filed an amended petition of appeal. He also initially filed typed written submissions. However before trial he filed hand written submissions and abandoned the typed submissions. At the hearing of the appeal the appellant relied on the hand written submissions.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that the three ingredients to be proved by the prosecution in a case of defilement were proved beyond any reasonable doubt. That penetration was proved beyond reasonable doubt. The age of the complainant was also proved by the prosecution beyond reasonable doubt. The identity of the appellant as the culprit was also proved beyond reasonable doubt as the complainant knew him well before and the incident occurred in broad day light. Counsel submitted that conducting a DNA test in sexual offences was not mandatory.

The prosecution called 6 witnesses at the trial. PW1 was the complainant. She testified on oath after the magistrate examined her intelligence. It was her evidence that she was in class two and aged 9 years. That on the 23rd October 2012 as she was going to the canteen at [particulars withheld], she met the appellant who greeted her at the river. The appellant suddenly covered her eyes with a lessa which she had and put something into her. After the incident he gave her Kshs. 50/= shillings. The next morning the appellant also gave Kshs. 50/= shillings to her grandmother (PW2). That she reported the incident to her grandfather who told her grandmother and the mother was called from Nairobi. She was later taken for treatment on 15th November 2012 at Tseikuru District Hospital and a P3 form was filled.

PW2 was K K the grandmother of the complainant. It was her evidence that on the 23rd October 2012 at

4pm she sent the complainant to buy sugar and millet. On coming back she informed her that the appellant had defiled her. On the next day the appellant came and gave her 50 shillings to buy soap for the girl and that she took the money as an exhibit.

PW3 was A S M the mother of complainant. It was her evidence that she worked in Nairobi as a house maid. That on 8th November 2012 her daughter told her that the appellant asked her for sex and covered her eyes at the river with a lessa. She advised that the matter be reported to the village elder. The matter was later reported to the police and the complainant was taken to hospital.

PW4 was the Chief of [particulars withheld] location. It was his evidence that on 9th November 2012 a defilement complaint was lodged with him. He referred the complainant to the police.

PW5 was the investigating officer Joshua Nyaga Tharaka a police constable. He received the report, referred the victim to hospital, recorded the statements and arrested the appellant.

PW6 was the Clinical Officer Francis Saku from Kyuso District Hospital. He produced the P3 form on the complainant filled by a colleague who had been transferred. The report was that the age of the child was not stated. The hymen was torn but already healed. There were lots of pus cells detected.

When put on his defence the appellant gave unsworn testimony. He stated that on 5th December 2012 while at his farm 4 people came and said they had been sent by the chief. Together they went to the chiefs office who ordered him to be taken to the GSU. There was another person who was arrested but then released. That complainant stated that the appellant was together with another man.

Faced with this evidence the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced him. He has now appealed to this court.

This is a first appeal. As a first appellate court I am duty bound to re-examine all the evidence on record and come to my own conclusions and inferences. See the case of ***Okeno Vs. Republic [1972] EA 32.***

I have re-evaluated the evidence on record. The incident occurred during the day. The complainant knew the appellant well before. She was said to have been aged 9 years. She was thus a very young person.

The age of the complainant was not proved through medical evidence or production of a birth certificate or other document. It was stated verbally by the complainant who testified as PW1 and the mother of the complainant (PW3) to be 9 years. The learned magistrate had to conduct examination on the complainant to determine her intelligence before allowing her to tender sworn testimony. In my view that action by the court meant that the complainant appeared to be a young girl. That in my view shows that the magistrate was convinced that the complainant was a young girl.

Though the age of the complainant was not scientifically determined in the circumstances of the present case I am of the view that the age was between 9 and 10 years. It was established by the prosecution beyond reasonable doubt. It would certainly be preferable for the age of a complainant in defilement cases to be specifically established, and the prosecution should in all cases do so. However in the present case I am of the view that the failure to produce a birth certificate or age assessment report was not fatal to the prosecution case. In my view the age was established by oral evidence.

This being a defilement case, the prosecution was also bound to prove beyond reasonable doubt that penetration occurred. The incident occurred on 23rd of October. The report to the chief was made on 10th of November which was about 17 days apart. This was a long delay indeed. The medical examination was done much later. The appellant was arrested on 5th of December 2012. In my view there was a considerable lapse between the time of the occurrence of the incident and the time a report was made and medical examination and treatment was done. The delay was however explained. PW2 to whom the report was initially made was an old woman. The mother of the complainant was all the way in Nairobi. Because of poverty the information could not be conveyed in good time. The appellant also tried to

compromise the matter by giving PW2 50 shillings as an inducement. I note that even though the P3 form was filled much later on 20th November 2012, the hymen was found to have been broken though healed. That was evidence of penetration. In my view therefore though there was a delay in reporting the matter, and also taking the complainant for treatment, penetration was proved beyond any reasonable doubt.

Was the appellant the culprit? Considering the evidence of the complainant PW1, and that of PW2 the grandmother, there is no reason why a court can consider that there could be mistaken identity or a grudge. The evidence of PW1 and PW2 in my view is honest evidence from a rural setting and circumstances. In my view the appellant was positively identified as the culprit. It is instructive that, in his defence, the appellant never referred to the date of incident and what he was doing on that day. He merely talked about the date he was arrested. In my view his defence was incredible and the learned trial magistrate was right in disbelieving him.

After re-evaluating all the evidence on record, it is my view that the conviction was well founded. The sentence is the minimum sentence provided by law.

I thus dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 6th day of May, 2015

GEORGE DULU

JUDGE